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Before The
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution and Carriage	MM Docket No. 92-265

PETITION FOR RECONSIDERATION

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TABLE OF CONTENTS

Summary ii

Preliminary Statement 1

I. Congress Did Not Intend To Subject Programmers To Burdensome Complaint Proceedings If The Complainant Has Not Been Injured 3

A. The Plain Language Of The Statute Requires A Specific Kind Of Injury For A Section 628 Violation And Permits Only "Aggrieved" Complainants To Seek

SUMMARY

Through this Petition for Reconsideration, Liberty Media seeks the following relief. To avoid entangling programmers in unnecessary proceedings and to forestall the tactic of negotiation through litigation, the Commission must require all complainants to make a threshold showing of [illegible]

interest. Even if the plain and consistent language of Section 628 were regarded as ambiguous, the "legislative history" surrounding rejection of the Manton Amendment does not support

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PETITION FOR RECONSIDERATION

Liberty Media Corporation ("Liberty Media"), pursuant to Section 1.429 of the Commission's Rules, hereby petitions for reconsideration of the Commission's First Report and Order in this proceeding, FCC 93-178, released April 30, 1993 ("Report & Order"). The Commission's rulings on the essential element of harm and the appropriate attribution standard are contrary to the plain language of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), inconsistent with the espoused policy objectives of Congress and the Commission, and/or arbitrary and capricious in view of the record developed in this proceeding.

Preliminary Statement

The Commission has recognized that Congress' primary concern in adopting the 1992 Cable Act is "with the exercise of market power by cable operators, and is not with...those entities supplying cable programming, a market in which there is abundant and increasing competition." Report and Order and Further Notice of Proposed Rulemaking (Rate Regulation), MM Docket No. 92-266, FCC 93-177 (rel. May 3, 1993), at ¶8. Both the Commission and Congress have acknowledged that cable operator investment in programming has benefited programmers and consumers alike. Consequently, in enacting the 1992 Cable Act, Congress clearly sought "to avoid unnecessary constraints on the cable programming market while protecting the interests of subscribers." Id.

Through this petition, Liberty Media seeks the following relief. To avoid entangling programmers in unnecessary proceedings and to forestall the tactic of negotiation through litigation, the Commission must require all complainants to make a threshold showing of injury. Such injury is an essential element of a Section 628 violation and a prerequisite for standing to complain to the Commission. In addition, the Commission should modify its attribution standard to permit programming investments by cable operators which do not enable those operators to discriminate against other distributors. Finally, the Commission should revise its rules to protect the confidentiality of proprietary information exchanged during pre-complaint dispute resolution efforts and to require a meaningful financial commitment from buying groups.

Liberty Media has filed extensive comments and reply comments in this proceeding which addressed and raised numerous issues. While the Commission recognized the needs of programmers for flexibility in responding to different and changing competitive conditions, it also failed to adopt numerous provisions which Liberty Media believed to be appropriate and supported by the record. Liberty Media also expressly reserved its right to challenge the constitutionality of the Commission's regulations and their application to Liberty Media. By limiting this petition to the above issues, Liberty Media does not waive and expressly reserves its right to petition for review or otherwise challenge the rules adopted by the Commission in this proceeding or their application to Liberty Media.

I. Congress Did Not Intend To Subject Programmers To Burdensome Complaint Proceedings If The Complainant Has Not Been Injured.

The Commission concludes that "complainants alleging violations of the specific prohibitions in Section 628(c)" need not "make a threshold showing that they have suffered harm as a result of the proscribed conduct." Report & Order ¶ 12. Liberty Media respectfully submits that this conclualso as a prerequisite for standing to file a complaint for such violation.

A. <u>The Plain Language Of The Statute Requires A Specific Kind Of Injury For A Section 628 Violation And Permits Only "Aggrieved" Complainants To Seek Redress.</u>

After examining the language of Sections 628(b) and (c) and the comments, the Commission concluded that "either of two interpretations could be supported by the express language of the statute:" (1) "Congress has already determined" that the conduct described in Section 628(c) "causes anticompetitive harm" to multichannel video programming distributors and, therefore, complainants alleging violations of subsection (c) need not show harm; or (2) because subsection (c) "requires the Commission to 'prescribe regulations to specify particular conduct that is prohibited by subsection (b),'" it may prohibit only that conduct which has the "purpose or effect" of hindering significantly or preventing a multichannel video programming distributor from providing programming to subscribers or consumers. <u>Report & Order</u> at ¶46. However, neither the Commission nor any commenter presented a single reference from the legislative history of Section 628 suggesting that Congress had determined that the conduct in Section 628(c) necessarily results in the harm required for a violation of the basic "prohibition" set forth in Section 628(b). Indeed, the language of Section 628 and its legislative history clearly indicate that the "regulations required" under subsection (c) must implement the basic prohibition of subsection (b).

In concluding that the requirement of harm in Section 628 is ambiguous, the Commission ignores operative provisions governing standing for the filing of complaints under that section. As Liberty Media explained in its Reply Comments at 6-7, Section 628(d) plainly and unambiguously states that a "multichannel video programming distributor aggrieved by conduct that it alleges constitutes a violation of subsection (b), <u>or the regulations of the Commission under subsection (c)</u> may commence an adjudicatory proceeding at the Commission" (emphasis added). The statute could not be clearer in stating a uniform standard for complainants' standing under subsections (b) or (c). It is well established that:

> [A]n "aggrieved party" has standing to challenge administrative action only if the party has suffered "injury in fact" to an interest "arguably within the zone of interests" protected by the underlying statute.

<u>Panhandle Producers & Royalty Owners Ass'n v. Economic Regulation Ass'n</u>, 847 F.2d 1168, 1173 (5th Cir. 1988). Here, Section 628(b) has identified the injury that complainants must plead and prove -- that the violative conduct "hinder(s) significantly" or "prevent(s)" the complainant from providing satellite cable or broadcast programming to viewers.

The Commission makes no mention of this uniform standing requirement when it reaches the opposite conclusion -- that complainants alleging a violation of subsection (b) must make a threshold showing of harm while those alleging a violation of subsection (c) need not make a similar showing. <u>See</u> <u>Report & Order</u> at ¶¶12, 46-49 and Appendix C at ¶¶14-19. Of course, there can be no doubt that an administrative agency

However, even if the plain and consistent language of Section 628 were regarded as ambiguous, the "legislative history" cited by the Commission does not support its conclusion that "Congress did not intend to place a threshold burden" on complainants to show that they were aggrieved by conduct alleged to violate Section 628(c). The Commission specifically notes that the Manton Amendment would have prohibited only unreasonable refusals to deal where such refusal would "unreasonably restrain competition." Report & Order at ¶47. However, the Commission again overlooks the fact that the operative provision governing complaints under the Manton Amendment was identical to Section 628(d) in providing for the commencement of an adjudicatory proceeding at the Commission by any multichannel video programming distributor "aggrieved by conduct that it alleges constitutes a violation of the regulations." 138 Cong. Rec. H6532 (daily ed. July 23, 1992). The only difference between the two is that, in order to be "aggrieved" under the Manton Amendment, a distributor would have been required to show an unreasonable restraint on competition, while a distributor "aggrieved" under the 1992 Cable Act must show that the "purpose or effect" of the allegedly violative conduct was to "hinder significantly or prevent" it from providing programming to consumers. Under either provision, the operative language unambiguously requires that, in order to initiate an adjudicatory proceeding at the Commission, a complainant be "aggrieved."

In short, the language of Section 628 requires an "aggrieved" complainant to show the kind of harm required for violative conduct under Section 628(b). There is no ambiguity permitting the Commission to resort to the legislative history in order to fashion an interpretation of the statute. See Burlington N. R.R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987) (where statute is unambiguous, legislative history is "irrelevant"). Even if the language were ambiguous, the Commission's reliance upon the rejection of the Manton Amendment clearly is misplaced. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 n.11 (1969) ("unsuccessful attempts at legislation are not the best of guides to legislative intent").

II. The Commission's Attribution Standard Is Over-Inclusive And Arbitrary.

The broad 5 percent attribution standard adopted by the Commission is over-inclusive and arbitrary. This standard necessarily presumes, for example, that a cable operator holding a 5 percent non-voting interest in a programmer has the incentive and the ability to force that programmer to discriminate against competing multichannel video programming distributors regardless of third-party ownership or voting control of the programmer. There is absolutely no factual basis in the record for this kind of all-encompassing attribution standard.

Indeed, the Commission concedes that its attribution standard is more restrictive than the broadcast standard and is "consistent with the standard we use in the video dialtone context." Report & Order at ¶32. However, the video dialtone standard was adopted to implement a statute which on its face prohibits telephone companies from providing video programming to subscribers in their telephone service areas directly or "through an affiliate owned by, operated by, controlled by, or under common control with" the telephone company. 47 U.S.C. §533(b)(1). Thus, the video dialtone attribution standard actually liberalizes the ownership prohibition in the statute.[1]

In contrast, both Congress and the Commission have determined that cable operator investment in programming provides substantial public interest benefits. See Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, 70 R.R.2d 1531 (1992) ("Network-Cable Cross-Ownership") at ¶13 ("[C]able service has benefited from vertical integration between cable operators and programmers, and...cable subscribers have benefited from MSO investment that has generated more original programming and a wealth of new viewing options for consumers."); Cable Television Consumer Protection And Competition Act of 1992, H.R. Rep. No. 628, 102d Cong., 2d Sess. 41 (1992). It is arbitrary and capricious for the Commission to apply a "consistent" attribution standard to telco a cable shareholder to the detriment of other shareholders. <u>See</u>, <u>e.g.</u>, Comments of Rainbow Programming Holdings, Inc. at 15 (where economic interest of non-cable shareholders "lies in maximizing distribution...an operator that attempted to inhibit the sale of programming would run the risk of breaching his fiduciary obligations" to the other shareholders).

The Commission also did not address the substantial evidence in the record showing that a cable operator with a minority interest in a programmer does not have the ability to induce that programmer to discriminate against competing varying degrees of "vertical integration." Report & Order at ¶33 n.19.

Finally, the Commission apparently overlooked the marketplace evidence presented by programmers demonstrating that cable operator investors do not induce affiliated programmers to discriminate against competing distribution media. See, e.g., Comments of Discovery Communications, Inc. at 8-9 (Discovery's cable operator owners receive no preferential treatment from either the Discovery Channel or the Learning Channel).

Liberty Media respectfully requests that the Commission consider these additional statutory protections and empirical data and revise its attribution standard so that the reach of its program access and antidiscrimination rules extends only to those situations in which Congress has perceived a potential problem in the marketplace, i.e. where cable operators have both the incentive and the ability to compel discriminatory behavior by an affiliated programmer. At a minimum, the Commission should incorporate the single majority shareholder, limited partner, and non-voting shareholder exceptions recognized under the broadcast attribution standards.

III. The Provisions Protecting The Confidentiality Of Commercial Information Should Be Extended To Pre-Complaint Responses In Order To Promote Private Resolution Of Disputes.

To "minimize the number of complaints," the Commission requires that a prospective complainant first notify a programming vendor of its belief that a violation of the Commission's rules has occurred, including "sufficient specificity so that the vendor...can determine the precise nature of the dispute." Report & Order at ¶¶74, 124, 146. In addition, the complaining distributor must allow at least ten days for "the potential defendant...to respond to the notice, and allow a reasonable time thereafter for negotiations." Id. at nn.101, 221, 240; see also Section 76.1003.[2] The Commission strongly encourages parties to attempt "to resolve the dispute without involving the Commission." Id. at ¶124. However, the Commission inadvertently has undermined such pre-complaint efforts by failing to extend its confidentiality provisions to pre-complaint submissions of proprietary information.

complaint. See, e.g., Report & Order at ¶¶78 nn.102-103 and 130 nn.225-227. Similar protections are afforded to proprietary information provided in discovery or in briefs filed with the Commission. Id. at ¶¶81 n.105 and 135; see also Section 76.1003(h) and (i)(5). In order to facilitate the exchange of information to promote pre-complaint resolution of disputes, the Commission should extend the protections available for proprietary information under Sections 76.1003(h) and (i) to information and contracts provided by a programming vendor during the pre-complaint notice and negotiation period.

IV. Buying Groups Must Provide Meaningful Financial Commitments To Support Their Programming Purchases.

While recognizing that buying groups may take advantage of volume discounts, Liberty Media maintained that a buying group must be similarly situated with a comparably-sized single purchaser. See Liberty Media Comments at 40-41. The Commission similarly concluded that, "in order to benefit from treatment as a single entity for purposes of subscriber volume, a buying group should offer vendors similar advantages or benefits as a single purchaser, excluding for example, some assurance of satisfactory financial and technical performance." Report & Order at ¶114. Unfortunately, the definition of "buying group" in Section 76.1000(c) offers little or no assurance that such buying group is capable of satisfying its financial obligations.

Specifically, Section 76.1000(c)(1) states that the members of a buying group may, "as contracting parties, agree to joint and several liability" in any contract between the buying group and a programmer. However, the same definition also permits the buying group to agree "to be liable for any fees due pursuant to a...contract which it signs as a contracting party as a representative of its members" without the individual members having any individual liability. Thus, there is no incentive for members of a buying group to agree to joint and several liability when they can shift all liability to the corporate entity acting as the buying group. Typically, such entities do not have any significant operating assets so that the agreement of a buying group entity to be

Conclusion

For the foregoing reasons, Liberty Media respectfully requests the Commission to reconsider its Report and Order in this proceeding. The plain language of Section 628 and the empirical evidence and analysis in the record of this proceeding compel conclusions different from those reached by the Commission.

Respectfully submitted,

June 10, 1993

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